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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. A-875

GARY RICHARD TIGERMAN,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Los Angeles, California 90012
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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a Writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner for a violation of the Universal Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1972. See Appendix B to this petition.[1]

This Petition for Writ of Certiorari is filed within the required thirty days time, as extended by Mr. Justice Douglas to April 2, 1972. See Appendix E.

The jurisdiction of the Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

The constitutional questions raised by petitioner involve both the First and the Fifth Amendments.

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[1] This petitioner's Petition for Rehearing was denied by the Court of Appeals on February 2, 1972. See Appendix C to this Petition.

First Amendment: Must the conscientious objector claim of a Selective Service System registrant coincide with the administrative agencies understanding of his religion? Involved is the question of whether the standard used here was an arbitrary import.

Fifth Amendment: Three questions are present.

(1) May an adverse conclusion be reached by a finding without the presence of a pertinent factual basis?

(2) May a hearing board arbitrarily refuse to hear any of petitioner's witnesses?

(3) May a man not a member of the hearing board order a registrant to report for induction?

The questions were raised in the trial court by a written motion for judgment of acquittal and briefed in the Court of Appeals twice.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the First and Fifth Amendments, and § 456 (j), of the Universal

Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.) and 32 C.F.R. § 1622.1 (b). They are set forth in Appendix D.

5. STATEMENT OF THE CASE

The indictment charged Tigerman with a violation of the Universal Military Training and Service Act for refusing to submit to induction. [C.T. 2]

He pleaded "not guilty" and was tried by the Honorable Irving Hill, District Judge, sitting alone without a jury. He was found guilty and sentenced.

6. THE FACTS

The facts are found in the Selective Service file of the appellant,[1] and the reporter's transcript.[2]

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[1]This file, Government's Exhibit, is pencil paginated at the bottom of each sheet and is hereafter referred to by the sheet number, such as [Ex. 1].

[2]This transcript is hereafter referred to by page and beginning line, such as [R.T. 6/11].

Appellant is a registrant of California Selective Service System Local Board No. 82.

On March 10, 1967 he filed his conscientious objector form [Ex. 25] showing his religious training and belief, and, on an attachment [Ex. 29] that his father, a WWII army officer had ". . . passed on to me of the horror and stupidity of war is graphic and most influential on me." His conscientious objector form, and its initial accompanying letters of support and corroboration are in the record [Ex. pp. 25-34].

He was then administratively processed three times:

1. On May 10, 1967 his local board (Local Board Panel B) had him in for an interview. No reason for rejecting his claim is stated in "Brief Summary" inserted by the clerk but the content of it showed a "self-defense" expression elicited from him [Ex. 42].

Eventually he was ordered to report for induction and, upon his refusal the file was sent to the United States Attorney for prosecution, this at the direction of the State

Director after a review by him [Ex. 69].

Local Board Panel B promptly called Tigerman in for an "interview" [Ex. 77]. Tigerman then sent in some more corroboration letters [Ex. 78-84].

2. On September 11, 1968 Local Board Panel B had another interview with him, the head clerk's [Executive Secretary] account of it showing:

> "Registrant asked the board members if he could bring some witnesses into the meeting to testify in his behalf. The board members informed the registrant that they would hear his statements and they did not believe witnesses were necessary."
>
> * * *
>
> "Board members asked registrant what he did for a living and if he had ever stolen anything in his life. Registrant stated he was employed as an actor and to the best of his knowledge he believes he stole a package of gum when he was about 12 years old."

* * *

"Board members asked registrant why he speaks of morality when he would allow his fellow americans [sic] to go out and die in his behalf."[Ex.85]

This time the "Brief Summary" left nothing to inference of speculation; it stated its rejection of his claim and its reasons, as follows:

"The local board members requested the following remarks be included in the minutes.

"Reviewed, not reopened. Local Board feels registrant does not qualify for I-O classification. His beliefs are philosophical, he does not attend religious services or functions and by his own admission was not a conscientious objector prior to the year 1966, when he was classified I-A" [Ex. 86].

Also see Exhibit, page 12 [Minutes of Actions] at February 11, 1970 for a somewhat similar formula entry.

He was again ordered to report for induction; he again reported but refused to submit to the final ceremony, and, at the

direction of the State Director, after his review of the file [Ex. 93] the local board sent it to the United States Attorney and this official, continuing his educational work, said:

> "The attached material referring to the above named subject shows, where appropriate, the subject's Selective Service number, and our declination of prosecution and the reasons therefore.
>
> Prosecution is declined in favor of the procedure suggested therein, and we are closing our file in this matter." [Ex. 99].

3. On May 13, 1970 Local Board Panel B, again met with Tigerman and, in a not so brief "Brief Summary," concluded:

> "Local Board is unanimous in finding the registrant not sincere in his religious beliefs. It has been noted that all previous board action also supports this belief and every effort was made to hear the registrant with open minds. Registrant in his deportment, appears to be playing a game of wits in opposition to selective service

> regulations. After his sarcastic presentation in the board room he was seen and heard, by the board secretary, counselling with waiting registrants. Registrant is not sincere." [Ex. 108].

Also see Exhibit, page 13 Minutes of Actions at May 13, 1970 for a somewhat similar formula entry.

Tigerman again was ordered to report for induction. He again reported and refused to enter the army.

7. REASONS FOR GRANTING WRIT

The questions presented are of an importance greater than the fate of one individual.

The questions are national ones because (1) the reach of the draft system is into every hamlet; (2) although the need for men may be less in the immediate future those young men who present the conscientious objector's problem will always be with us the percentage now being greater than ever.

The need for national guide lines on

what respect is due a prima facie conscientious objector claim and on what are and what are not proper standards for judging sincerity is evidenced in this case by the continuing dissent of the ranking judge of this Court of Appeals' panel.

8. ARGUMENT

POINT I

THE FIRST AMENDMENT APPLIES

The majority in the Court of Appeals upheld the final conclusion of insincerity, made by the administrative agency. The factual bases for the agency finding are found in the record, the summaries of their three meetings with this petitioner.

A. The Three Meetings

1. The summary of the first meeting does not conclude that the petitioner was insincere; in fact, it asserts no basis for its rejection, although the board's summary does include a now obsolete basis, a "self-defense" statement petitioner made at the meeting. [Ex. 42]. At this stage, when the file was sent to the United States

Attorney he rejected prosecution ". . .as there is no basis in fact for the registrant's classification." [Ex. 75].

The United States Attorney probably had *Sicurella** in mind. Also the Court of Appeals does not appear to base its decision on anything that occurred so far.

2. The summary of the second meeting recites the conclusion that "registrant does not qualify for I-O classification. His beliefs are philosophical, he does not attend religious services or functions and by his own admission was not a conscientious objector prior to the year 1966, when he was classified I-A"[Ex.86].

Here we do have bases, advanced for the legitimately stated conclusion: "does not qualify."

The initial two, (1) "His beliefs are philosophical" and (2) he does not attend religious services or functions" will be discussed under this Point I, the third basis cited is to be considered under

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* Sicurella v. United States, 348 U.S. 385

Point II below. Although the United States Attorney again rejected the file [Ex. 99] caution dictates that we dispose of the initial two at this time.

We believe we should also because the board, after its third meeting with petitioner started its conclusion with these two sentences: "Local Board is unanimous in finding the registrant not sincere in his religious beliefs. It has been noted that all previous board action also supports this belief. . ."

With respect to "His beliefs are philosophical" our comment is that this alone is no longer a valid basis for rejection. United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970).

With respect to "he does not attend religious services or functions" our comment is the same: Seeger, *supra* and Welsh, *supra*

3. The third meeting he had with his local board presents a complication: the court below used it as its basis for decision. Therefore, we must comment on it item by item although much of this comment merges into a Fifth Amendment argument

and will not be repeated in our Point II.

B. Finding of Insincerity

The majority below cites the local board's finding of insincerity [Ex. 107-8] and to certain portions of the record as support for such a finding, namely, (1) his conduct at the May 13, 1970 meeting and (2) the "inconsistencies" of his written presentation.

(1) His conduct at the May 13, 1970 meeting:

The majority catalogs the following four items (footnote 2 of its opinion):

1. ". . . though afforded the opportunity to fully expound his views appellant appears to have regarded the proceedings lightly, at one point laughingly stating that his vision was rather short."

Our view: The young man was in a difficult posture: he was alone, forbidden counsel and even friends. The regulations forbid assistance of an attorney and, while not forbidding assistance of witnesses

[32 C.F.R. § 1624.2 (b)] do encourage the board to think it can arbitrarily keep out witnesses.*

Next, he had run a veritable gauntlet, as follows: he had met the board on May 10, 1967, the Appeal Agent on August 9, 1967, again the board on December 18, 1967, and again the board on September 11, 1968.

Also, he went through the induction ceremony twice before this final meeting with the board. The repeated questioning at this meeting, often on patently irrelevant matters, would tire almost any high spirited young man who didn't have an advisor present to caution him not to laughingly answer.

Finally, the majority recounts, he added a wisecrack: "at one point laughingly stating that his vision was rather short." This, in context was using the imagery of his questioner who

---

* We argue this refusal to permit him witnesses as an abuse of discretion in our Point II (b), below.

asked if registrant "had no vision to look forward or backward." This is no different than the answer of the WWII front-line infantrymen as to what he thought of the war: "To me the war is 10 yards wide."

2. Next, the majority points out: "He again alluded to his religious upbringing."

Our view: Having had religious training does not necessarily require that one's conscientious objections be religious views.

3. Next, it is pointed out: ". .and as further evidence of his sincerity boasted of his participation in protest marches and anticipated presentation of a musical play, the theme of which would similarly be a war protest."

Our view: Neither the board nor the majority can have it both ways, that is, damn him if he does and damn him if he doesn't.

He was not volunteering; he was

being put upon his proof. He was trying to show he not only was a contemplative pacifist but was an active one; recounting his activity should be considered an answer, not a boast. Conscientious objection is generally a wholly subjective matter. Here, he was trying to meet the board's express desire for objective evidence.

4. Finally, the majority notes "The interview was flavored with appellant's ultimatum that he would refuse induction regardless of the board's determination. The board concluded that the appellant, in his deportment, appeared to be engaged in a game of wits and that he was 'not sincere.' Selective Service File, Plaintiff's Exh. 1, Pa. 107-08."

Our view: The page of Government's Ex. 1 that is immediately before the Clerical Assistant's account of this last meeting is numbered 106. Page 106 is the board's invitation to him to come to the meeting. The invitation

tells him the ground rules quoting the regulation pertaining to such a meeting [§ 1624.2 (b)], as follows:

> (b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing by the registrant and, in either event, shall be placed in the registrant's file.

First, he was complying with the invitation, the ground rules. Second he was straightforward, his final comment [on Ex. 108] should be considered only

as a staunch expression of his principles. He had already done what probably none of them would do: twice walk up to prison's door for his beliefs; he would do this again, if required.

Did the board expect him to be docile, to cower? After many prior meetings with draft board officials, and after having twice before been ordered to report for induction *and* having gone through the army induction processing each time and finally, after the working-over they gave him on this, the fifth confrontation was he wrong in thinking (if he really did, he never said so) that this was turning out to be "a game of wits?" It certainly had all the elements of an adversary proceeding, a David-Goliath affair.

The Tenth Circuit had this to say on a related matter:

> Belisle was impressed by the fact, and no doubt influenced in his conclusions, by his impression

that Annett did not have "that humility ordinarily incident to one having that deep, sincere, religious objection to service in our military forces." Based upon this he stated, "It is, therefore, the considered opinion of your hearing officer that the evidence is insufficient to sustain the position taken by the registrant."

The statute does not make humility, whatever that means, an element of one's right to exemption from military service on the ground of religious scruples and beliefs against war. To be sincere in the teachings of Jehovah Witness religion does not require that one must grovel and fawn or be timid. One may stand up and give manly straightforward answers to questions propounded to him without fear of having his good faith in his religion impugned.

Annett vs. United States, 10 Cir., 1953,

205 F.2d 689, 692.

(2) Claimed inconsistencies.

The majority points out the following five items:

1. "Appellant registered on January 11, 1966, indicating his occupation to be a student. Appellant's completed classification questionnaire was received by the local board on March 22, 1966; he made no claim of conscientious objector status in the space provided (Series VIII, SSS Form 100). Appellant did state on the questionnaire that he had previously attempted to enlist in the Air Force but was found to have been underweight."

Our view: At age 18 not many young men know how deep their views are, if any, in opposition to killing of any kind; or, how deep they are going to become.

Many persons have been enlisted and have later changed their views and been considered sincere. The reports are full of such cases. He

explicitly stated this namely, that his views had changed since he attempted to become an Airman.

Furthermore, he was a student at that time and a student's deferment is "lower" than a conscientious objector's and therefore cannot be "considered" by the Selective Service System. § 1623.2

The above circumstances are of no pertinence.

2. "In a personal interview before the local board on May 10, 1967, appellant stated that he had held his non-violent views for approximately six months, but later admitted his probable support of the defense of life and property."

Our view: There is nothing incompatible between a belief in self-defense and a strong disbelief in the indiscriminate violence of war.

This is well established by many reported appellate cases. Also, see Sicurella, *supra*.

3. "In a subsequent appearance before the board appellant indicated a general retraction of statements he thought damaging to his conscientious objector claim made in the previous interview."

Our view: What we said in ¶1 immediately above applies here. Everyone refines his views and articulation of them. Counsel will do just that if certiorari is granted.

4. "Appellant seems to argue that he became absolutely entitled to a conscientious objector classification merely upon the presentation of evidence in support of his claim; i.e., on presentation of a prima facie case the board virtually was without power to cast doubt on his veracity."

Our view: We do not so argue. We assert that the law requires facts to support an adverse conclusion on a man's veracity and sincerity.

Annett, supra, at page 690: "To merely state that he does not consider

him sincere without giving a single fact upon which such belief is predicated does not rise to the dignity of evidence."

Also Blevins v. United States, 9 Cir., 1954, 217 F.2d 506;

Dickinson v. United States, 346 U.S. 389 (1953).

5. "Appellant repeatedly traced the origin of his beliefs to his religious upbringing, but at one point stated that his objection to violence was of only six months' duration. Recognizing the paradox, he later stated: "Suddenly, the seeds of religious education that were laying largely dormant burst and grew in meaning."

It is more often than not the very nature of conscience to be dormant and to burst forth and grow in meaning. Also, that is precisely the way seeds act in nature.

Applying the final sentence of the majority in *Dickinson, supra*, we conclude that the local board based its

"dismissal of the claim solely on the basis of suspicion and speculation. . ."

POINT II

THE FIFTH AMENDMENT APPLIES

A. No basis in fact. The argument made under Point I that an administrative agency may not establish a standard of definition for religious conduct that conflicts with the intent of the Act, as defined and construed by this Court also shows that there is present an infringement of the Fifth Amendment.

The bases used by the agency, and by the Court below are, in the words of the dissent below "irrelevant" and contrary to Dickinson vs. United States, 346 U.S. 398 (1953)

Particularly so is the concluding element of the board's reasoning ". . he was seen and heard, by the board secretary counselling with waiting registrants." [Ex. 108]

B. Denial of witnesses.

We argue that it was an abuse of discretion for the board to permit no witnesses to attend Tigerman's meeting. The record [R.T. 13] shows that his two prospective witnesses refused entrance had not written any letters so their testimony was lost to him.

In a conscientious objector case a registrant's sincerity and truthfulness is the most important factor. In a hearing on this kind of claim fairness requires admission of a reasonable number of witnesses. The new Act recognizes this but fair dealing always recoghized this point.

The majority cites the following support for its view:

1. "United States v. Evans, [illegible] F.2d 302 (9th Cir., 1970), which upheld the regulation in denying the appearance of witnesses, controls; Uffelman v. United States, 230 F.2d [illegible]97 (9th Cir., 1956)."

Our view: *Uffelman* is readily distinguishable in that it is undisputed that

Tiegman's prospective witnesses had written no letters for him whereas in Uffelman (p. 303-304). It is said:

> "The two "mature" men whom the appellant offered as witnesses were Hendrickson and Brese. As we have seen, however, both these men, together with others, had written letters in the appellant's behalf, which unsworn statements had been submitted to the Local Board. Such unsworn statements could be and were considered by the Board. The appellant was therefore not prejudiced by not being permitted to have those men appear before the Board in person.

2. United States v. Evans, 425 F.2d 302 (9th Cir., 1970).

This decision adds nothing in that it relies wholly on *Uffelman* plus citing.

3. United States v. Nugent (1953) 346 U.S. 1, 8.

There is nothing in *Nugent* to support *Evans*, holding on page 8 of *Nugent*; or anywhere in Nugent.

On the contrary, on page 8 of

Nugent, it is stated that: "He must fill out forms, calculated to put him to the test;[13] he must supply any additional detailed information which may be necessary for a searching investigation of his claim; and, if he or his local board demands it, he may appear in person to explain his position to the persons charged with determining its validity.[14]"

Footnote 13 of Nugent shows *that the registrant is to furnish character witnesses.* Tigerman tried! [R.T.13]

In *Tigerman* we have a situation where a boy earnestly tried to present his subjective case first by a written form and next by witnesses who knew his character and presumably his reputation for truthfulness. He was rebuffed. This was wrong.

One school of legal thought contends that it is better that the law be settled, though wrong. To this we do not agree.

Moreover, as shown above *Evans, Uffelman and Nugent* are readily distinguishable.

The Selective Service System Regulations provide that a registrant should be classified in accordance with a system of selections which is "just and fair" (Section 1622.1 (b)). The court in *United States v. Graham*, 108 F.Supp. 794 (1952) at 797, put it this way:

> "A full and fair disposition of the defendant's contentions at every level of the Selective Service System is the measure of their rights."

Petitioner brought to his hearing before the Local Board various witnesses willing to testify in his behalf, regarding his sincerity, truthfulness, of his conscientious objection. As the transcript of the trial pointed out:

> Q. Did you have some witnesses in the reception room of this place ready to testify for you?
>
> A. Yes, sir.
>
> Q. Were any of those witnesses ones who had never written any letters for you?
>
> A. Two of them [R.T. 13].

For no rational reason the Local Board refused to hear Tigerman's witnesses.

By such exclusionary action the Local Board acted unfairly against the petitioner and therefore his conviction should not stand.

United States v. Weller, 309 F.Supp. 50 (1969);

United States v. Kobil, E.D. Mich., No. 32, 390, Sept. 13, 1951;

United States v. Glessing, Minn., No. 8173, Nov. 30, 1951;

United States v. Kolchak, C.D. Calif. No. 4691, Feb. 2, 1970.

We reproduce portions from the reporter's transcript of the above, unreported cases:

Kobil. Judge Picard said:

"He has got ten days in which to say, 'Well, I want to be heard.' He said he wanted to be heard. He came down there with two witnesses. They wouldn't let his witnesses in.

"That was wrong, unless it appeared that his witnesses were creating some kind of a disturbance or were there

for the purpose of preaching Jehovah's Witness doctrines. But they might have been there to show that he was on the corner and sold tracts, or that he went from door to door, and they might have been there for the purpose of showing that he was a conscientious objector and yet the board never heard them. That is wrong; absolutely wrong and unAmerican. The boards might as well find it out now as at any time.

"Now, the fact that this man won't salute the flag makes my blood boil; and that he won't fight for his country also makes my blood boil. But that hasn't anything to do with this, with you and me. I am the Judge; I have got to follow the law as it is in making a decision - not my natural tendencies, because he probably would have been in jail long ago if I had been permitted to follow my natural tendencies. That isn't it.

"I want to look at this from the angle that I believe I should as a Judge."

Glessing. Judge Joyce said:

"Why this Board didn't hear these three witnesses that the young man brought in I don't know. I don't know whether their story would have been an elaboration of what he had already told the Board or if it was supporting testimony which might have gone into greater detail than he had presented which might have disclosed facts which if the Board knew them might have caused them to change his classification. It doesn't seem to me that it is quite the American way to slap down a man and say we won't hear you at all about this thing. He was there; he was earnest; he was trying to get their story to the Board. What the story was I don't know. He doesn't know now because he wasn't permitted to use them and the Board doesn't know or didn't know because the Board wouldn't proceed to hear them."

Molchak. Judge Curtis said:

"Gentlemen, in this case it seems to me that the registrant's state-

ment of his basis for a conscientious objector status is prima facie sufficient.

"It would seem to me that if it were to be denied, the only basis, if any, for denying it would be one of two grounds:

"One would be a lack of training which seems to be the basis upon which the Board turned it down. They seemed to think there was a lack of religious training here.

"The other one is possibly his insincerity:

"Taking the last one first, it seems to me the Board cannot rely upon insincerity in a case where the registrant has appeared for a hearing with witnesses who are there to testify for his sincerity or as to his insincerity. If that were the question it would seem to me the Board is dutybound to listen to his witnesses in that regard, and when they do not they are therefore foreclosed from refusing his classification as a CO on that ground.

"Now, as to the lack of training, as near as I can tell from what they said at the hearing, it is that this has been the basis. They said, 'We have got to follow the rules and the rules require that they have religious training, and you have not had any.'

"I guess the defendant had better come to the podium.

"The evidence here, it seems to me, shows that the defendant has had a religious background in his family. The Board admits that he does not have training in the church necessarily.

"I am at a loss to find that the defendant's experience is such as to be permitted to show that he is without religious training. All of his letters indicate that he was brought up in a religious home. Both members of his family were quite religious. The defendant has some extremely unorthodox religious views.

"If that is the basis upon which the denial is granted, it is not a proper basis. I think that he was

improperly denied his classification."

Finally, the inequity of such a hearing has been recognized and the new draft law's regulations will permit him three witnesses to testify at such a local board hearing.*

It is submitted that Petitioner was improperly denied his witnesses and prejudiced by said denial.

CONCLUSION

For the reasons given certiorari should be granted and the judgment should be reversed.

Respectfully,

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Attorney for Petitioner

March 30, 1972

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* 32 C.F.R. § 1624.4 (c) [Federal Register, Vol. 36, No. 212]

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff Appellee,
vs.
GARY RICHARD TIGERMAN,
Defendant-Appellant.
No. 71-1576

[October 13, 1971]

Appeal from the United States District Court
For the Central District of California

Before: MERRILL and CHOY, Circuit Judges, and POWELL,* District Judge

PER CURIAM:

Appellant, Gary Richard Tigerman, appeals from a judgment finding him guilty of violation of 50 U.S.C.App. §462. Appellant attacks his conviction on three grounds: (1) That there was no basis in fact for the local selective service board's finding that he was insincere in his conscientious objector claim; (2) That the board acted improperly in refusing to allow witnesses to appear in his behalf; and (3) That the induction order was improperly signed by a member of a panel other than the one to which his classification had been assigned.

Appellant registered on January 11, 1966, indicating his occupation to be a student. Appellant's completed classification questionnaire was received by the local board on March 22, 1966. He made no claim of conscientious objector status in the space provided (Series VIII, SSS Form 100). Appellant did state on the questionnaire that he had previously attempted to enlist in the Air Force but was found to have been underweight.

Appellant, on March 10, 1967, filed with the board SSS Form 150, Special Form for Conscientious Objector, wherein he asserted a belief in a Supreme Being; appellant related his general

*Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, sitting by designation.

Christian Science upbringing, including the teachings and guidance of his parents and certain writings, as being most influential in the crystallization of his beliefs, noting a nearly lifelong abhorrence of fighting and violence.[1] In a personal interview before the local board on May 10, 1967, appellant stated that he had held his nonviolent views for approximately six months but later admitted his probable support of the defense of life and property.

In a subsequent appearance before the board appellant initiated a general retraction of statements he thought damaging to his conscientious objector claim made in the previous interview. His 1-A classification remained unchanged. On August 30, 1967, appellant was ordered to report for his pre-induction physical; he reported and was found to be fully acceptable for induction into the Armed Forces. Thereafter, appellant failed to report for induction as ordered.

During the ensuing twenty-eight months appellant failed to comply with another order to report, was granted another personal interview, and submitted additional materials and information in support of his conscientious objector claim. At this third interview the local board did not listen to witnesses who were brought to testify in appellant's behalf, two of whom had previously submitted letters generally vouching for his credibility. The local board reopened appellant's classification on February 6, 1970. On May 14, 1970, appellant appeared in person before the board for the fourth time, the result of which was a unanimous finding of insincerity.[2] Appellant, for the third time, was

[1] "[E]ven as a child I never provoked fights, resorted to profanity or enjoyed fighting in any company." Selective Service File, Plaintiff's Exh. 1, Pa. 26.

[2] The brief summary of appellant's personal appearance before the board on May 13, 1970, indicates that he was primarily opposed to violence; though afforded the opportunity to fully expound his views appellant appears to have regarded the proceedings lightly, at one point laughingly stating that his vision was rather short. He again alluded to his religious upbringing, and as further evidence of his sincerity boasted of his participation in protest marches and anticipated presentation of a musical play, the theme of which would similarly be a war protest. The interview was flavored with appellant's ultimatum that he would refuse induction, regardless of the board's determination. The board concluded that the appellant, in his deportment, appeared to be engaged in a game of wits, and that he was "not sincere." Selective Service File, Plaintiff's Exh. 1, Pa. 107-8.

ordered to report for induction but he again refused. The present prosecution and conviction followed.

The test in determining whether one's belief sufficiently entitles him to a conscientious objector exemption is whether it is sincere and meaningful. *United States v. Seeger*, 380 U.S. 163, 176 (1965). If the registrant's opposition to all war stems from beliefs held with the strength of traditional religious convictions the sincerity test is satisfied. *Welsh v. United States*, 398 U.S. 333, 339-40 (1970). Denial of conscientious objector status is, however, justified upon a finding either that the registrant does not in fact believe his outward manifestations or that such belief is not "deeply held." *United States v. Coffey*, 429 F.2d 401, 405 (9th Cir. 1970). This Court, in the *Coffey* decision, *supra*, stated:

> "The local board might have based such a determination, for example, upon prior statements or actions . . . inconsistent with his stated beliefs." 429 F.2d at 405.

Appellant seems to argue that he became absolutely entitled to a conscientious objector classification merely upon the presentation of evidence in support of his claims; *i.e.*, on presentation of a prima facie case the board virtually was without power to cast doubt on his veracity. The law is otherwise. Citing *Witmer v. United States*, 348 U.S. 375 (1955), this Court less than a year ago, in *United States v. Kember*, 437 F.2d 534, 536 (9th Cir. 1970), held:

> "A registrant's sincerity in professing beliefs which, prima facie, entitle him to conscientious objector status, is always open to inquiry and, if insincerity is found, rejection of the claimed exemption is appropriate."

Any fact which casts a doubt on the sincerity of the registrant's religious convictions is relevant to support the denial of conscientious objector status. *Maynard v. United States*, 409 F.2d 505, 506 (9th Cir. 1969); *Selby v. United States*, 250 F.2d 666 (9th Cir. 1957). And the board's action is entitled to the support of any inference of sham or insincerity on the part of the registrant which it could have drawn validly and fairly from the record. *Bradley v. United States*, 218 F.2d 657, 661 (9th Cir. 1954).

Here the record fully supports the board's finding of insincerity. Appellant repeatedly traced the origin of his beliefs to his religious upbringing, but at one point stated that his objec-

tion to violence was of only six months' duration. Recognizing the paradox, he later stated: "Suddenly, the seeds of religious education that were laying largely dormant burst and grew in meaning."[3]

Next appellant contends that the local board improperly declined to hear the testimony of his corroborative witnesses. 32 C.F.R. §1624.1(b) explicitly limits any rights of appearance before the board to the registrant. *United States v. Evans*, 425 F.2d 302 (9th Cir. 1970), which upheld the regulation in denying the appearance of witnesses, controls. *See also, United States v. Nugent*, 346 U.S. 1 (1953); *Uffelman v. United States*, 230 F.2d 297 (9th Cir. 1956).

Lastly, appellant seeks to elevate to a denial of due process the fact that his induction order was signed by a member of the local board who was not on the panel to which his classification had been assigned. 32 C.F.R. §1632.1, which deals with the order to report, is silent on the matter of signing. This Court has repeatedly held that an induction order signed by a clerk is valid. *United States v. Wallace*, 435 F.2d 12 (9th Cir. 1970); United States v. Doran, 418 F.2d 1226 (9th Cir. 1970); *United States v. Baker*, 416 F.2d 202 (9th Cir. 1969). The record is barren of any indication that the signing member took part in or made any ruling on appellant's classification. If indeed this can be regarded as an administrative defect, appellant has shown no prejudice. Certainly the mere act of signing, a purely ministerial function, in itself is insufficient to be accorded constitutional significance.

Affirmed.

MERRILL, Circuit Judge, Dissenting:

Unlike my brothers, I do not find in this record any inconsistencies in statements made by appellant which relevantly bear on the question of insincerity, nor any other basis for a determination of insincerity sufficient under *Dickinson v. United States*, 346 U.S. 398 (1953).

Accordingly, I would reverse.

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[3]Selective Service File, Plaintiff's Exh. 1, Pa. 83.

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT DEC 2 1972

WM. B. LUCK, CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

GARY RICHARD TIGERMAN,

Defendant-Appellant.

No. 71-1576

On Petition for Rehearing

Before: MERRILL and CHOY, Circuit Judges, and POWELL, District Judge

Rehearing denied.

Judge Merrill would grant rehearing.

APPENDIX C

J U D G M E N T

[Not here yet; see App. B for date (Feb. 2, 1972) of denial of Petition for Rehearing]

APPENDIX D

Amendments Involved

I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§ 456 (j) Universal Mil. Tr. & Serv. Act

(j) **Conscientious objectors.**—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and beliefs" does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to

Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title.

(k) Duration of exemption or deferment.—No exception from registration, or exemption or deferment from training and service,

§ 1622.1 (b) of the Regulations

PART 1622—CLASSIFICATION RULES AND PRINCIPLES

GENERAL PRINCIPLES

1622.1 General Principles of Classification.—(a) (1) Primary liability for military training and service provided by the selective service law is placed on those persons in the follow-

* * *

(b) Classification is the key to selection and it must be accomplished in the spirit of the Military Selective Service Act of 1967, in which the Congress has declared "that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-875

GARY RICHARD TIGERMAN,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April, 1972.

/s/ W. O. Douglas

Associate Justice of the Supreme Court of the United States

Dated this 26th day of February, 1972.

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FILED
MAY 23 1972

No. 71-1215

In the Supreme Court of the United States

OCTOBER TERM, 1971

GARY RICHARD TIGERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1215

GARY RICHARD TIGERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of willful refusal to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). He was sentenced to imprisonment for one year and one day. The court of appeals affirmed (Pet. App. A).

Petitioner's refusal to report for induction followed a protracted series of proceedings before his local

board which resulted in the rejection of his claim for classification as a conscientious objector. The defense to this prosecution and petitioner's principal argument here is that the local board's denial of his claim was without any basis in fact.

Petitioner registered with his local board on January 11, 1966 (SSF 1), and submitted his Classification Questionnaire (SSS Form 100) on March 22, 1966 (SSF 4). The completed questionnaire revealed that petitioner had been rejected for enlistment in the Air National Guard in September 1965 because he was underweight (SSF 8) and that petitioner was not claiming exemption as a conscientious objector (SSF 7). On June 8, 1966, petitioner was classified 1-A (SSF 11).

On June 22, 1966, petitioner advised his local board by letter that he was applying to the Royal Academy of Dramatic Arts in England and asked whether full-time attendance at the school would entitle him to a student deferment. The local board responded that it would be necessary for petitioner to submit verification of his acceptance at the school prior to any local board action. Petitioner then enrolled at San Fernando Valley State College during the 1966-1967 school year (SSF 21-22) but apparently discontinued his enrollment sometime during or after completing his first year in June 1967 (SSF 22, 47, 122).

On March 1, 1967, petitioner requested the Special Form for Conscientious Objectors (SSS Form 150) which he completed and returned on March 10, 1967 (SSF 25). Petitioner claimed that by reason of his

religious belief and training he was conscientiously opposed to participation in war in any form. Explaining the nature of his belief, petitioner stated (SSF 25, 29):

> I believe in a perfect, spiritual entity embodying and expressing the absolutes of Truth and Love as I have been taught to understand them from childhood. It is to this ideal that I constantly refer and pattern my actions on. That is, I try to live up to my highest sense of good as epitomized by the Supreme Being. This is my first and only duty. If I can keep my mind thus concentrated on Principle, I will be better able to find the best answers to any moral questions arising from human relations. "Seek ye first the kingdom of God and all these things will be added unto you" LUKE 12:31. My highest sense of good condemns war and forbids my participation in it.

In explaining "how, when, and from whom or from what source [he] received the training and acquired the belief" which is the basis of his claim, petitioner stated that he had been raised in a Christian Science home and attended Sunday School "since earliest childhood." Petitioner stated further that his parents "as [sic] Sunday School teachers" and the writings of Mary Baker Eddy had been instrumental in instilling in him "abhorence of violence and the immorality of reversion to war in order to settle differences" (SSF 26, 29). Petitioner also cited examples in his life, going back to childhood, which conspicuously demonstrated the consistency and depth of his religious convictions (SSF 26).

Petitioner made no effort to reconcile his attempted enlistment in the Air National Guard with his belief which he now claimed to have been instilled in him during childhood. A number of letters from friends and family attesting to petitioner's sincerity were also submitted to the local board (SSF 30-35). Petitioner's father wrote the local board that, on the basis of "soul searching conversations" with his son, it was clear that petitioner was not a pacifist but opposed killing over political and ideological differences. Petitioner would view violence in defense of himself, his neighbor or a defenseless party as necessary but not justified (SSF 34). While this and the other letters attested to the sincerity of petitioner's objection to war, none of the letters spoke of petitioner's religious training and belief, despite the fact that this belief was the basis upon which petitioner's abhorence of violence assertedly rested.

On May 10, 1967, petitioner appeared for a preclassification interview (SSF 35). When asked by the local board how long he had adhered to his professed religious beliefs against violence, petitioner said about six months but explained that "he's never had these problems presented to him where I had to face them" (SSF 34). Petitioner did not explain why the problem had not been presented when he attempted to enlist in the Air National Guard after the introduction of American ground combat forces in Vietnam.

On May 25, 1967, petitioner was classified 1-A and requested a personal appearance before the local

board. Petitioner again reiterated his position, based upon his religious beliefs, in opposition to violence. But contrary to his earlier interview, when he indicated that he would support the defense of life and property against attack (SSF 35), petitioner stated he would put up no defense if his house was invaded because "he does not hold his property as being something he would fight for, and further said he does not find his sense of security in being defended or in physical strength but only in principle" (SSF 42).

The local board then classified petitioner as 1-A. After a physical examination, in which he was found fit for service (SSF 52), petitioner addressed a letter to the local board setting forth a collection of excerpts from religious works "which have been a source of much soul searching and ultimately of inspiration" (SSF 53).

Petitioner was ultimately ordered to report for induction after unsuccessfully appealing his classification within the Selective Service System. Although petitioner refused induction, the United States Attorney declined prosecution on the ground that there was no basis in fact for the denial of petitioner's classification (SSF 75).[1]

Petitioner was again invited to appear for another preclassification interview which took place on September 11, 1968. A number of letters from friends and family were again submitted and petitioner also

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[1] The local board had not stated any reasons for its denial of petitioner's claim for conscientious objector classification (SSF 43).

submitted a long written statement, apparently in an effort to reconcile his claim that his religiously grounded beliefs against violence had been inculcated during childhood with his unsuccessful effort at enlistment and his statement to the board that he had held these beliefs for only six months (SSF 83).

Petitioner explained that prior to his freshman year at Valley State College in September 1966, he did not know exactly what a conscientious objector was nor did he consider risking his career and a normal happy life by refusing induction or facing imprisonment. But he said his first year at Valley State College, "agonizing and exciting and filled with questions," was the turning point. It was then that he began to mature, understand the significance of his own behavior and understand what ethics and morality were all about. Although personally safe from induction because of his studies, he became committed to understanding the true nature of war (SSF 83):

> Suddenly, the seeds of religious education that were laying largely dormant burst and grew in meaning. I read and re-read all that I could find in the church literature, in Emerson, Thoreau and ghandi's [sic] works to expose the reality of the issues at stake: the issues of "What is the relationship of man to his fellow man and what is man's relationship to God?" In quiet reflection as well as in emotional discussion the answers and the implication of those answers became evident. It is immoral to kill. * * *

After the hearing which followed the submission of the written statement, the local board declined to reopen the classification and found that petitioner did not qualify for 1-O classification because "his beliefs [were] philosophical, he does not attend religious services or functions and by his own admission was not a conscientious objector prior to the year 1966, when he was classified 1-A" (SSF 86). Petitioner was then ordered to report for induction and again the United States Attorney declined prosecution after petitioner failed to comply. The United States Attorney requested the local board to reopen the case and give petitioner an opportunity to submit further information (SSF 100). On February 12, 1970, petitioner was advised that he was removed from delinquency status and classified 1-A. Petitioner then requested a personal appearance, concluding his request "Love Gary" (SSF 104).

Again after this personal appearance on May 13, 1970, the local board unanimously voted to classify petitioner 1-A (SSF 108). The local board stated that it was "unanimous in finding the registrant not sincere in his religious beliefs." The local board further noted (SSF 108):

> It has been noted that all previous board action also supports this belief and every effort was made to hear the registrant with open minds. Registrant in his deportment, appears to be playing a game of wits in opposition to selective service regulations. After his sarcastic presentation in the board room he was seen and heard, by the board secretary, councelling [sic]

with waiting registrants. Registrant is not sincere.*

Petitioner's file was then forwarded to the State Appeal Board which classified petitioner I-A on August 6, 1970 (SSF 110). Petitioner was ordered to report for induction on September 8, 1970. Petitioner complied with the order to report but refused induction, and his indictment, trial and conviction followed.

1. Petitioner contends here, as he did below, that there is no basis in fact for the local board's finding of insincerity and the denial of his conscientious objector claim. The argument was properly rejected by the court of appeals.

The ultimate question in conscientious objector cases "is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form." *Witmer* v. *United States*, 348 U.S. 375, 381. Any fact which casts doubt on the veracity of the registrant is relevant. It is "affirmative evidence * * * that a registrant has not painted a complete or accurate picture * * *". *Dickinson* v. *United States*, 346 U.S. 389, 396, *Witmer* v. *United States*, 348 U.S. at 382. The record in this case before the board contains words and acts which cast doubt on the veracity of petitioner's claim.

Petitioner's initial request for a conscientious objector classification made it plain that his beliefs, which were rooted in his religious background, were molded and instilled in childhood and reflected by examples in his life (SSF 26). Yet petitioner admitted to the local board that he held his beliefs for

only six months prior to making his claim. Petitioner attempted to explain this inconsistency initially by stating that "these problems" had never been presented to him "where [he] had to face them" (SSF 34). But petitioner failed to explain why "these problems" were not presented when he sought to enlist in the Air National Guard Reserve.

Again, perhaps recognizing the inconsistencies in his position, petitioner sought to attribute his apparently new found beliefs to his first year at Valley State College, described by him as "agonizing and exciting and [full of] questions," which caused "the seeds of his religious education that were laying largely dormant" to blossom (SSF 83). The argument that his religious beliefs "were dormant" is not wholly consistent with the examples of the behavior in petitioner's life which he had earlier cited as most conspicuously demonstrating the consistency and depth of his religious convictions.

The decision to grant a conscientious objector exemption depends on the application of expertise by administrative bodies in resolving underlying issues of fact. "[F]act-finding for purposes of Selective Service classification is committed primarily to the administrative process, with very limited judicial review to ascertain whether there is a 'basis in fact' for the administrative determination." *McGee* v. *United States*, 402 U.S. 479, 486. In the present case, the inconsistencies in petitioner's words and actions along with other inconsistent statements re-

garding the nature of his convictions,[2] as well as petitioner's attitude and deportment at his final interview, which were noted by the local board (SSF 107-108), provide a sufficient basis in fact for the board's finding of insincerity here. *Witmer* v. *United States*, *supra*; *Gruca* v. *Secretary of the Army*, 436 F. 2d 239 (C.A.D.C.), certiorari denied, 401 U.S. 978; *United States* v. *Coffey*, 429 F. 2d 401 (C.A. 9); *United States* v. *Evans*, 425 F. 2d 302 (C.A. 9), certiorari denied, 402 U.S. 987; *Selby* v. *United States*, 250 F. 2d 666 (C.A. 9).

2. Petitioner further contends that the decision of the local board not to hear witnesses proffered in support of his claimed exemption requires a reversal of his conviction. At the time petitioner made his request to present witnesses, all but two of those persons offering testimony had previously submitted written information to the board in support of petitioner's exemption. Moreover, petitioner was afforded a further opportunity prior to his final meeting with the board to submit the written statement of those or other witnesses (SSF 106), which he did not do. The decision of the local board to adhere to 32 C.F.R. 1624.1(b) and permit only written statements of witnesses was within its discretion and does not warrant reversal of his conviction. *United States* v. *Evans*, 425 F. 2d 302 (C.A. 9), certiorari denied, 402 U.S. 987; *Uffelman* v. *United States*, 230 F. 2d 297 (C.A. 9).

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[2] Petitioner retracted his statement with respect to his willingness to support the defense of life and property (SSF 35, 42).

This is a troubling case, as is evidenced by the opinions in the court below. It does not appear to involve any uncertain questions of law and there does not appear to be any basis to improve upon the handling of the facts by the court of appeals. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 466403 762

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. A-875

GARY RICHARD TIGERMAN,
Petitioner,
-vs-
UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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FOR THE NINTH CIRCUIT

Petitioner Tigerman raised a point in his Motion for Judgment of Acquittal [Clerk's Transcript, page 22] as follows:

> "16. The provision for denial of legal counsel at a meeting with the local board is contrary to the Fifth Amendment."

This court, in Weller v. United States,

remanded the case to the United States Court of Appeals for the Ninth Circuit and it, on May 11, 1972 hear oral argument and took the matter under submission.

Weller was a draft case, appealed by the government when the trial judge held that there was no statutory authority for the Selective Service System's regulation denying the right to counsel at a meeting of its registrant with the local board.

Since the conduct of petitioner Tigerman at his meeting with his local board is a chief basis used to reject his claim of conscientious objection our Petition was remiss in not emphasizing denial of counsel by a reference to *Weller* (our argument emphasized the denial of witnesses) putting it this way:

> "The young man was in a different posture: he was alone, forbidden counsel and even friends. The regulations forbid assistance of an attorney and, while not forbidding assistance of witnesses [32 C.F.R. § 1624.2 (b)] do encourage the board to think it can arbitrarily keep out witnesses." [Petition, p. 13-14]

Then, under the sub-head "B. Denial of Witnesses we used pages 25-34 to argue our Fifth Amendment point and emphasizing the witness denial.

It is suggested by your petitioner that disposition of his petition could well await the final outcome of *Weller*.

Respectfully,

J. B. DIETZ
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257 S. Spring Street
Los Angeles, Calif. 90012
Attorney for Petitioner

May 23, 1972